

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JFK)
W.R. GRACE & CO., .
et al., .
Debtors. .
824 North Market Street
Wilmington, DE 19801
June 7, 2010
10:30 a.m.
.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good morning, please be seated. This is
2 the matter of W.R. Grace, 01-1139. I have a list of
3 participants by phone; Elisa Alcabes, Scott Baena, Janet Baer,
4 Ari Berman, David Blabey, Deanna Boll, Thomas Brandi, Peg
5 Brickley, Michael Brown, Claire Burke, Elizabeth Cabraser,
6 Kellie Cairns, Christopher Candon, Richard Cobb, Tiffany Cobb,
7 Daniel Cohn, George Coles, Andrew Craig, Leslie Davis, Michael
8 Davis, Elizabeth DeCristofaro, Martin Dies, John Donley,
9 Michael Duggan, Terrance Edwards, Lisa Esayian, Sander Esseman,
10 Marion Fairey, Debra Felder, Richard Finke, Jordan Fisher,
11 Roger Frankel, Theodore Freedman, Michael Giannotto, James
12 Green, Robert Guttmann, Sarah Harnett, Robert Horkovich, Brian
13 Kasprzak, Matthew Kramer, Arlene Krieger, Peter Lockwood, Alan
14 Madian, David Parsons, Carl Pernicone, Margaret Phillips, John
15 Phillips, Mark Plevin, Francine Rabinovitz, Joseph Radecki,
16 Alan Rich, Andrew Rosenberg, Alan Runyan, Jay Sakalo, Robert
17 Sales, Alexander Sanders, Darrell Scott, William -- I'm sorry -
18 - Warren Smith, Jason Solganick, Daniel Speights, Shayne
19 Spencer, Theodore Taconelli, David Thompson, Rita Tobin,
20 Edward Westbrook, Richard Wyron, Rebecca Zubaty, and Tancred
21 Schiavoni. I'll take entries in court, please, good morning.

22 MS. BAER: Good morning, Your Honor, Janet Baer, on
23 behalf of W.R. Grace.

24 MR. DONLEY: John Donley, on behalf of W.R. Grace.

25 MR. FREEDMAN: Theodore Freedman, on behalf of W.R.

1 Grace.

2 MR. O'NEILL: James O'Neill, on behalf of W.R. Grace.

3 MR. HURFORD: Mark Hurford, Campbell Levine, on
4 behalf of the ACC.

5 MR. FRANKEL: Good morning, Your Honor, Roger
6 Frankel, on behalf of David Austern and the PIFCR.

7 MR. LOCKWOOD: Good morning, Your Honor, Peter
8 Lockwood, Caplan & Drysdale, on behalf of the ACC.

9 MR. WISLER: Good morning, Your Honor, Jeffrey
10 Wisler, on behalf of Maryland Casualty Company.

11 MR. LONGOSZ: Good morning, Your Honor, Edward
12 Longosz, on behalf of Maryland Casualty Company.

13 MR. TACCONELLI: Good morning, Your Honor, Theodore
14 Taccconelli, for the Property Damage Committee.

15 MR. HOGAN: Good morning, Your Honor, Daniel --

16 THE COURT: Excuse me, one second. I'm sorry, thank
17 you.

18 MR. HOGAN: Good morning, Your Honor, Daniel Hogan,
19 on behalf of the Canadian Zonolite Claimants.

20 MS. MUMFORD: Good morning, Your Honor, Kerri
21 Mumford, on behalf of the Libby Claimants.

22 THE COURT: Good morning.

23 MR. MCDANIEL: Good morning, Garvan McDaniel, on
24 behalf of Arrowwood.

25 THE COURT: Good morning.

1 MS. CASEY: Good morning, Your Honor, Linda Casey, on
2 behalf of BNSF Railway.

3 MR. MANGAN: Your Honor, Kevin Mangan, on behalf of
4 the State of Montana.

5 THE COURT: Good morning.

6 MR. TURETSKY: Good morning, Your Honor, David
7 Turetsky, of Skadden Arps, on behalf of Sealed Air.

8 MR. RICH: Good morning, Your Honor, Alan Rich, on
9 behalf of the Property Damage FCR.

10 THE COURT: Anyone else? Ms. Baer?

11 MS. BAER: Thank you, Your Honor, good morning. Your
12 Honor, Agenda Item Number 1 is the debtors' objection to the
13 Massachusetts Department of Revenue of Claims. We are still
14 working on a settlement, Your Honor. Drafts are circulating,
15 it's kind of a complicated mess, but we're getting there. We'd
16 like that continued to July 12th?

17 THE COURT: It's July 14.

18 MS. BAER: Oh, sorry.

19 THE COURT: The date was changed from Monday to
20 Wednesday.

21 MS. BAER: Thank you, Your Honor, I will make a note
22 of that. Your Honor, the second matter is the debtors' omnibus
23 objections to remaining tax claim objections, are still
24 pending. We're still working on those, so, again, we'd like to
25 continue that to July 14?

1 THE COURT: All right.

2 MS. BAER: Your Honor, Agenda Item Number 3 is a
3 property damage -- I'm sorry, an insurance settlement, which
4 has also already been approved by the Court and an order was
5 entered. Your Honor, Agenda Item Number 4 is the quarterly fee
6 application for the fourth quarter of 2009. If Your Honor has
7 not already entered the order, I have a slightly revised
8 exhibit to it?

9 THE COURT: I thought that order had been entered.
10 It has.

11 MS. BAER: Then, Your Honor, if I could hand up a
12 revised order, there was one minor change in an exhibit? It
13 had to do with some expenses for one of the firms; Ferry
14 Joseph's expenses, so if I could hand up then a revised order,
15 that's the only change?

16 THE COURT: All right. It's says -- it's called,
17 "Caption Revised Order."

18 MS. BAER: We put the revised on it to make the
19 distinction.

20 UNIDENTIFIED SPEAKER: (Indiscernible).

21 MS. BAER: Great.

22 THE COURT: Okay, that order's entered.

23 MS. BAER: Thank you, Your Honor. Your Honor --

24 MR. SMITH: Your Honor, I'm sorry, this is Warren
25 Smith, the fee auditor. If that concludes the fee matters,

1 Your Honor, if I could be excused?

2 THE COURT: Yes, sir, thank you.

3 MR. SMITH: Thank you.

4 MS. BAER: Your Honor, Agenda Item Number 5 is the
5 final fee application of Piper Jaffray. Your Honor, Piper
6 Jaffray was the financial consultant for the future claimants
7 representative. The individuals who are working for Piper
8 Jaffray that represent the FCR left the firm and joined another
9 firm, so Piper Jaffray has filed their final fee application in
10 the case. The fee auditor did do a final report and there are
11 no objections to the entry of the order.

12 THE COURT: Was a CSE filed, I thought one of the
13 items -- and, I'm sorry, I don't recall which one -- oh, 6 was
14 continued, this is 4. I thought I'd already entered the orders
15 on 5, 7, and 8.

16 MS. BAER: You did on 7 and 8. We hadn't seen 5,
17 perhaps it just hasn't hit the docket yet.

18 THE COURT: I'll have to double check to be sure.

19 MS. BAER: Thank you, Your Honor.

20 THE COURT: Okay, I've made a note.

21 MS. BAER: Your Honor, Agenda Item Number 6 is, in
22 fact, the Canadian Counsel's application for substantial
23 contribution. This relates to the time period that led up to
24 the minutes of settlement, and is related to the Chapter 11
25 plan. Your Honor, we'd like to continue that to July 14th. An

1 amended application will be filed within the next few days that
2 clarifies a few issues and corrects some errors and some
3 expenses, so we will file an amended -- shouldn't say, we --
4 the Canadian Counsel will file an amended application shortly,
5 and we'll that one heard on the 14th.

6 THE COURT: All right.

7 MS. BAER: Your Honor, you did enter orders on 7 and
8, which were the substantial contribution -- second
9 substantial contribution applications of the Canadian firm, as
10 well as the Delaware counsel, Mr. Hogan's firm. And, that then
11 takes us, Your Honor, to the last agenda item, which is the
12 Maryland Casualty objection of the debtors and the various
13 responses, and Mr. Donley will address that matter.

14 THE COURT: All right.

15 MR. WISLER: Good morning, Your Honor, Jeffrey
16 Wisler, on behalf of Maryland Casualty Company. Before Mr.
17 Donley begins, I wanted to present Your Honor with an agreed
18 order, that all the parties have seen and approved, that for
19 all intensive purpose, it removes the intervention joinder
20 issue for today. If I may hand it up?

21 THE COURT: All right.

22 MR. WISLER: If you saw the papers, Your Honor, then
23 you know that Maryland Casualty objected to the Libby Claimants
24 involvement in this contested matter, and we reserved our
25 rights with regard to the participation of the ACC and the FCR.

1 The debtors did the same, they reserved their rights with
2 regard to the ACC, and the FCR, and the Libby Claimants. But,
3 at the end of last week, the Libby Claimants agreed to withdraw
4 their joinder without prejudice. They are not a party to this
5 contested matter, but they have a right to move this Court to
6 reenter it, some point in time, under the terms of the order.

7 THE COURT: Well, I think I should address this,
8 frankly, after the argument, because I'm a little confused as
9 to why this objection to claim is pending, at this point,
10 because, I thought, under the amended plan -- which, of course,
11 I am working on the confirmation order. I don't have any
12 confirmation order yet -- but, in the event the plans
13 confirmed, I thought Maryland Casualty was a settled insurer
14 whose contribution and indemnity claims, if any, would be
15 treated under the trust. So, if that's the case, what is the
16 -- I'm confused as to why I have an objection to claims. I
17 think, I had better wait to see what this joinder issue is all
18 about because I don't know whether we're going to be pursuing
19 an objection to claim today, so I'm not sure, if there is no
20 pursuit, what this does to your agreed order.

21 MR. WISLER: Well, Your Honor, obviously, we'll
22 proceed any way Your Honor wants. I don't disagree with your
23 concern and I'll address that, but I know Mr. Donley has the
24 opportunity to go first because it's his objection. What that
25 order does that we put in front of you is, it avoids a

1 necessity for the Libby Claimants to, today, get involved in
2 the argument that you're about to hear. So, that's probably
3 important, especially, since we all agreed to it. Not that
4 Your Honor agreed to it, but I know Mr. Cohn may be on the
5 phone but he probably would have been here had he thought he
6 was going to be involved. And, this, essentially, reserves his
7 client's rights to come in later, if, as Your Honor points out,
8 there is a later.

9 THE COURT: Well, the part of it that concerns me is
10 the sentence that says, "However, without prejudice, to any
11 party's right to object or otherwise be heard thereon, the
12 Libby Claimants may hereafter move to participate in the claims
13 objection in the event that, (a) the claims objection is no
14 longer being prosecuted by the debtors, the ACC, or the FCR."
15 Well, I think --

16 MR. WISLER: Fair enough, Your Honor, I understand.

17 THE COURT: Okay. Mr. Donley, I'm confused as to why
18 I have a claimant's objection, at all, at this time, with
19 respect to ACC?

20 MR. DONLEY: Well, I hope I can clarify. We would
21 have no problem, at all, with deferring the further prosecution
22 of this claim objection, at this time. It may be depending on
23 if and when we get Your Honor's confirmation order, then it's
24 not necessary to proceed. However, the reason we've kept it
25 moving along, we didn't want to be accused by any one of not

1 being diligent and moving forward with the process, in the
2 event it did have to be determined at some point, so that's the
3 very simple, practical, reason why we've proceeding, and we
4 would be absolutely fine if it were simply, essentially,
5 stayed, at this time, pending Your Honor's confirmation order.

6 THE COURT: Well, do I understand the first amended
7 plan correctly, that in the event that it is confirmed,
8 Maryland's claims for contribution and indemnity would be
9 channeled to the trust and dealt with there, so I don't really
10 need objections to the claims?

11 UNIDENTIFIED ATTORNEY: Your Honor, that is precisely
12 what the plan contemplates.

13 THE COURT: And this is an objection to the claims
14 for contribution and indemnity, correct?

15 MR. DONLEY: Yes, Your Honor, precisely.

16 THE COURT: Okay, Mr. Wisler, I'm not -- as I said,
17 I'm not sure why I have this objection here today?

18 MR. WISLER: Your Honor, we're fine with deferring
19 this until after claim confirmation, that was something that
20 we'd mentioned at the beginning of the process.

21 MR. LOCKWOOD: Your Honor, while it is true that if
22 you confirm the plan, Maryland Casualty's claim will go to the
23 trust. Maryland Casualty has a planned confirmation objection
24 --

25 THE COURT: Yes.

1 MR. LOCKWOOD: -- based on the proposition that its
2 claim should not be channeled to the trust. We, obviously,
3 dispute that, but one of the reasons that we made the objection
4 was that if Maryland Casualty does not have a legitimate
5 indemnity claim, then Your Honor would not have to address the
6 Class 9 versus Class 6 issue. Obviously, if Your Honor wants
7 to proceed forward based on the assumption that you're going to
8 overrule Maryland Casualty's objection to not being in Class 9,
9 we would all welcome that.

10 But, I'm a little bit confused, because we're sort of
11 in a no-man's land, here we got two hypotheticals. One
12 hypothetical is that the claims going to the trust, the other
13 hypothetical is that is goes against Grace in Class 9. While
14 we agree you don't have to resolve trust claims, at this point,
15 on the other hand, if it's a Class 9 claim, then this claim's
16 adjusted just like any other claims objection. So, you know,
17 I'm a little bit puzzled about where we're all headed on this,
18 to be honest with you.

19 THE COURT: So am I, Mr. Lockwood, and that's why I'm
20 not totally sure why I have this objection now. It seems to me
21 that if, in fact, it's channeled, this objection's moot. If
22 it's not channeled, it may be why. But, I did, just a few
23 minutes ago, take a look at the Third Circuit's opinions on
24 this subject, because I don't think I made any rulings directly
25 as to whether or not there was or wasn't an indemnity

1 obligation, but there's this language in the Third Circuit
2 non-precedential Gerard opinion; the one that was decided in
3 2004, and I'll read the paragraph.

4 It says, "Before the bankruptcy Court, plaintiff's
5 contended that the injunction should not apply to stay their
6 litigation, because although MCC was a named insurance carrier,
7 suits against whom were stayed. The suit was not for coverage
8 for asbestos related liability, so the injunction should not
9 cover MCC. The bankruptcy Court had little difficulty
10 rejecting this argument, notwithstanding plaintiff's assertion
11 that the claims against MCC are for its role in working with
12 Grace on a dust control system for the Libby Mine, it did so as
13 its workers compensation carrier and its liability, if any,
14 would be for injury to plaintiffs from asbestos."

15 Then it says, "Further the prospect of
16 indemnification by Grace made inclusion of the stay of the
17 suits against MCC appropriate," that's really dealing with the
18 injunction issue, not the liability issue. But the Circuit
19 seems to think that this is a claim that ought to be channeled.
20 I don't know how else to read this paragraph.

21 Then, if I look at the 2009 suit -- I'm sorry,
22 opinion -- the one filed about the State of Montana, on
23 December 31st of 2009 -- pardon me, I have to find it here. I
24 didn't mark it. One second. Okay, it starts at headnote 9,
25 "If there's reemphasis that MCC and Grace were parties to a

1 contract, in which Grace had agreed to indemnify MCC against
2 any future asbestos related claims filed against MCC that arose
3 out of Grace's asbestos liability. Thus, MCC had a clear
4 contractual right to indemnity, which may have presented a more
5 direct threat to the Grace's reorganization," and then it goes
6 on for other reasons. Again, focusing on the injunction, but
7 seeming the State, that looking at the policies, there's an
8 indemnity claim. So I -- I mean, I have to consider this in
9 connection with the plan confirmation hearing.

10 MR. DONLEY: And, further, Your Honor, we believe at
11 the hearing, we made a record that these claims should be in
12 Class 6 and should be channeled, so this objection is really a
13 matter of -- and if that's the case, we don't need to take up
14 the objection. We were -- again, we were simply proceeding so
15 we weren't being less than diligent in moving forward in the
16 hypothetical event Mr. Wisler succeeded in having them found to
17 be Class 9, which we disagree with.

18 THE COURT: Well, okay, I think the best thing would
19 be, simply, for me to defer this objection to claim until I get
20 through that confirmation issue, and if it turns out that I
21 think they belong in Class 9, then, I think, we need to
22 reinstate this objection at that time. But, I'm having -- just
23 having looked at the Third Circuit's language and my own
24 assessment from the argument on the injunction, way back when,
25 I'm having some difficulty seeing how they won't be channeled,

1 but I'm not prepared to say today, because I haven't -- I'm not
2 through all of the confirmation issues yet that they will be.

3 MR. DONLEY: That's absolutely fine with us, Your
4 Honor. Just one second to check with my client here. Yes,
5 that's absolutely fine with us, Your Honor.

6 THE COURT: Mr. Wisler?

7 MR. WISLER: We understand your position, Your Honor.

8 THE COURT: Okay, then, I'm going to ask, Ms. Baer,
9 if you'll simply monitor this because I think it may be moot,
10 and I'll need some separate order that deals with this
11 objection at the end of the plan confirmation process, but if
12 it's not moot, then I need you to put it onto an agenda so that
13 I can hear the argument at that time. Okay, having said that,
14 then, I think I can enter this order -- the agreed order --
15 regarding the Zonolite, because I'm not going to consider this
16 issue today, and if it's moot, they -- their joinder is a
17 joinder in a moot action, and if it's not moot, then the
18 debtor, I'm sure, will be pursing this with diligence, anyway,
19 so I will sign the agree order. Okay, I guess, I should offer
20 this, I have read this binder of everything, and I'm sure you
21 folks are prepared to argue. If you want to go through with an
22 argument today, I have the time to hear it, it's not that, I
23 just think that it may be moot.

24 MR. DONLEY: I don't love to hear myself talk that
25 much, Your Honor.

1 THE COURT: Mr. Wisler?

2 MR. WISLER: I don't love to hear him talk that much,
3 either.

4 THE COURT: All right, then, I'll simply ask that
5 this be monitored by the debtor and put on to an agenda for
6 some resolution after the confirmation orders -- order -- is
7 entered. Okay, thank you. Anything else?

8 MS. BAER: No, Your Honor.

9 THE COURT: My goodness, all right, we're adjourned.

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C E R T I F I C A T I O N

I, WENDY ANTOSIEWICZ, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Wendy Antosiewicz

WENDY ANTOSIEWICZ

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